JAN 31 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1955

No. 655

DORIS SYLVIA GREY, infant, and HOWARD MARTIN GREY, infant, children of HARRY M. GOLDBERG, deceased, and SOPHIE GOLDBERG, deceased, by ESTHER WEINER, their guardian *ad litem*,

Petitioners,

AGAINST

AMERICAN AIRLINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ARTHUR M. LAUFER,
No. 70 Pine Street,
New York 5, N. Y.,
Attorney for Petitioners.

Of Counsel:

JOHN M. FOLEY.
SAMUEL S. STURIM

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth-2-0689

INDEX

PAGE

Citations 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

A. In General 3

B. The Evidentiary Basis for the Jury's Verdict 5

1. The Testimony of Claude and Forbes.. 5

2. The Actual Lewis Testimony—Its Lack of Credibility 7

REASONS FOR GRANTING WRIT:

POINT I.—The judicial pronouncement that wilful misconduct had not been established constituted an unwarranted intrusion into the jury's exclusive province and resulted in a denial of the constitutional right to a jury trial 8

POINT II.—The Courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness 16

POINT III.—Failure to comply with the provisions of the Warsaw Convention bars respondent from limiting liability thereunder 17

POINT IV.—The verdicts were not excessive and should not have been set aside 19

CONCLUSION 23

DEC 24 1957

236735

PAGE

APPENDIX:

Opinion of United States Court of Appeals for the Second Circuit 25

Opinion of United States District Court, Southern District of New York 32

CASES CITED

American Airlines v. Ulen, 186 F. 2d 529 12

Broadcast Music Inc. v. Havana Madrid Restaurant Corp., 175 F. 2d 77 16

Dyer v. MacDougall, 201 F. 2d 265 16

Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 22

Gunning v. Cooley, 281 U. S. 90 10

International-Great Northern R. Co. v. Acker, 128 S. W. 2d 506 22

Jacob v. N. Y. City, 315 U. S. 752 10

Kaminski v. Chicago R. & I. Co., 200 F. 2d 1 15

Lavender v. Kurn, 327 U. S. 645, 652-653..... 9

MacKay v. Costigan, 179 F. 2d 125 15
Myers v. Pittsburgh Coal Co., 233 U. S. 184 10

N. L. R. B. v. Howell Chevrolet Co., 204 F. 2d 79 ... 16

Pekelis v. T.W.A., 187 F. 2d 122 13
People v. Tuczkewitz, 149 N. Y. 240 16

PAGE

Quok Ting v. U. S., 140 U. S. 417 16

Sonnentheil v. Christian Morelein Brewing Co., 172 U. S. 401 16

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29 8
Texas & P. Ry. Co. v. Riley, 183 S. W. 2d 991 22

Union Trust Co. v. Eastern Airline, October 1955 Term, #298 10

STATUTES CITED

Federal Rules of Civil Procedures, Rule 50(b) 2

United States Code, Title 28, Section 1254, (1) 2

United States Code, Title 28, Section 1332(a)(1) .. 2

Civil Air Regulation 61.3 (10) 14 CFR 696 4

Civil Air Regulation 61.301, 14 CFR 725 ..... 4, 11

Civil Air Regulation 61.310, 14 CFR 727 ..... 4, 11

Warsaw Convention:

Article 3 (1) (2) (49 U. S. Statutes 3015) 17

Article 3 (1) (c) 18

Article 3 (2) 18

Article 4 (4) 18

Article 9 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

DORIS SYLVIA GREY, infant, and HOWARD MARTIN GREY, infant, children of HARRY M. GOLDBERG, deceased, and SOPHIE GOLDBERG, deceased, by ESTHER WEINER, their guardian *ad litem*,

Petitioners,

AGAINST

AMERICAN AIRLINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioners, Doris Sylvia Grey and Howard M. Grey, infants, by their guardian *ad Litem,* Esther Weiner, pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered in the above entitled matter on November 30, 1955, affirming judgment of the United States District Court for the Southern District of New York setting aside jury verdicts in petitioners' favor.

Citations

The decision of the Court of Appeals for the Second Circuit affirming the order of the District Court setting aside jury verdicts in petitioners' favor in the aggregate amount of $90,000.00 and directing the entry of judgment

in favor of petitioners for $16,600.00 is reported in 227 F. 2d 282 (C. A. 2, 1955). The opinion of the United States District Court for the Southern District of New York granting respondent's motion under Rule 50(b) of the Federal Rules of Civil Procedures and setting aside the said jury verdicts is not reported and is annexed hereto. The decision of the said District Court denying petitioners' motion to strike from respondent's answer to limit liability under the provisions of the Warsaw Convention is reported in 95 F. Supp. 756 (D. C. S. D. N. Y., 1950).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 30, 1955. The jurisdiction of this Court is invoked under Section 1254, (1), Title 28, United States Code.

The jurisdiction of the District Court was invoked under the Authority of Section 1332 (a) (1), Title 28, United States Code.

Questions Presented

Petitioners seek a reversal of the determination of the United States Court of Appeals for the Second Circuit affirming an order of the United States District Court for the Southern District of New York granting respondent's motion under Rule 50(b) of the Federal Rules of Civil Procedure and setting aside a jury's verdict in petitioners' favor in the aggregate amount of $90,000.00. The questions thus presented are:

1. Whether the extensive excursions into the relative credibility and probative weight of evidence by the Court below under the guise of a determination of legal sufficiency constituted an unwarranted intru-

sion into the jury's exclusive province and deprived petitioners of their constitutional right to a jury trial.

2. Whether the courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness.

3. Whether error was committed in denying petitioners' motion to strike Warsaw Convention defenses from respondent's answer thereby requiring petitioners to establish wilful misconduct rather than negligence.

4. Whether the jury's verdicts were excessive and should have been set aside.

Statement of the Case

A. In General

Suit was brought under the Death Statutes of the State of Texas to recover for the wrongful death on November 29, 1949 of the parents of the infant petitioners, while passengers on one of respondent's flights.

The flight emanated at LaGuardia Airport, New York City, destined for Mexico City, Mexico, with regularly scheduled stops at Washington, D. C., Dallas, Texas and Mexico City, Mexico. The plane crashed at Love Field, Dallas, Texas, killing 28 of the 46 persons aboard, at about 5:30 A.M. on November 29, 1949 while the Captain was flying up and around for a second landing approach. The Captain, First Officer and Flight Engineer survived the crash and testified at the trial.

A jury, at the conclusion of an eight day trial, found that the wilful misconduct of the co-pilot Lewis was a substantial contributing cause of the accident. The jury

found that while the Captain was in personal command, Lewis without authorization or knowledge of the Captain, contrary to Civil Air Regulations,* assumed control of the plane, failed to carry out his superior's command to retract the flaps to take off position, feathered one of three functioning engines, and caused the plane to crash. The jury found that the junior officer substituted his judgment for that of the pilot whom he did not consider to be competent. Implicit in the jury's verdict is a finding that Lewis was deliberately attempting to bring the plane in for a crash landing at the very moment the Captain was taking the plane up and around for a new landing approach.

The jury accepted the testimony of Captain Laurens Claude and that of the Flight Engineer, William F. Forbes, and rejected that given by the Co-Pilot Robert E. Lewis.

---

*Civil Air Regulation 61.3 (10) 14 CFR 696

"* * * (10) Pilot in command. Pilot in command shall mean the pilot responsible for the operation and safety of the aircraft during the time defined as flight time."

Civil Air Regulation 61.301, 14 CFR 725

"Command of flight. The pilot in command shall be in command during the flight of the aircraft."

Civil Air Regulation 61.310, 14 CFR 727

"Emergency decisions. The pilot in command is authorized, in emergency situations which require immediate decision and action, to resolve upon a course of action which is required by the factors and information available to him. He may, in such situations, deviate from prescribed methods, procedures, or minimums to the extent required by considerations of safety. When such emergency authority is exercised, the pilot shall, to the extent possible, keep the proper control station fully informed regarding the progress of the flight. He shall submit a written report of any such deviation to his operations manager. The operations manager shall furnish a copy of such report, with his comments, promptly to the Administrator."

B. The Evidentiary Basis for the Jury's Verdict

1. The Testimony of Claude and Forbes

The flight had progressed without incident from Washington, D. C., to the vicinity of Nashville, Tennessee, when the outboard engine on the port wing, sometimes referred to as the No. 1 engine, developed difficulty. As a result, it was feathered (192a) and shut off.* Approximately two and one-half hours later, the plane reported in range of Dallas and was cleared to land. Shortly before the plane reached the airport, the Flight Engineer noted that the fuel flow gauge for the outboard engine on the starboard side, the No. 4 engine, read zero and so advised the Captain (211a, 314a). At this point the plane was properly aligned with the runway and preparing to execute a routine landing. The Captain immediately ordered the fuel booster pump applied to the No. 4 engine (212a) which caused the No. 4 engine to surge or overspeed, and the left wing to dip fifteen to twenty degrees (212a-213a). The plane turned to the left as it crossed the end of the runway (214a, 215a).

The Captain reduced power on the starboard side, increased the power in the No. 2 port engine and brought the plane to a level position to the left of the runway (214a). Full power was then applied in all engines and the flaps and gears were ordered up for another approach (216a). This was all done in accordance with normal procedure. At this point the plane had progressed approximately 800 feet beyond the edge of the runway and was at an altitude of 30 to 40 feet (216a) and climbing. The plane continued to climb until it crossed the No. 7

*On the preceding flight another Captain noted that the No. 1 engine repeatedly backfired and trailed black smoke. This was not noted on the log sheet, as was required (App. 271a, 411a). This defective condition was not known to Captain Claude.

runway, a distance of more than two-thirds the width of the field (221a), to a height above the hangars when it stalled and started to settle (217a). The left wing tip hit the northeast end of a hangar and the plane crashed. The Captain testified affirmatively that the No. 4 engine was developing power at all times. The Captain never gave any order to feather the No. 4 engine (219a) and both he and Forbes were unaware that it had been cut out (219a, 332a). The Captain testified that it was Lewis' action that caused the crash in cutting off the No. 4 engine (222a).

An examination of the No. 4 engine and the booster pump following the accident by the respondent's experts found them in good running order (116a, 117a, 119a).

Forbes testified that there was adequate fuel available in the No. 4 tank at all times (75a). He acknowledged that the gears and flaps had been extended by him on order of the Captain before he noted that the No. 4 fuel pressure gauge read zero (79a). He immediately advised the Captain of this fact and was directed to apply the booster pump (80a). The Captain then directed the co-pilot to retract the gears and to raise the flaps (80a, 331a). Forbes saw Lewis turn the gear handle to the up position but did not note what action Lewis took, if any, in relation to the flaps (81a). Forbes testified affirmatively that no order was given to feather the No. 4 engine (332a). He was not aware that it had been shut off. There was a time interval of between thirty seconds and one minute between the order to retract the gears and raise flaps and the crash (316a). It is apparent from Forbes' testimony, and the jury so found, that the plane was not in *extremis* until the No. 4 engine was shut off.

2. The Actual Lewis Testimony—Its Lack of Credibility

The testimony of the co-pilot is materially different from that given by the Captain Claude and was necessarily rejected by the jury in its entirety.

The co-pilot Lewis, stated that the No. 4 engine developed difficulty when the plane was approximately ½ mile from the field (336a) after the flaps and gears had been fully extended (168a) and as the plane was preparing to execute a three engine landing. Air speed was 155 miles per hour and the altitude 600 to 700 feet. When the plane was between 1500 and 2000 feet inside of the boundary of the field and a few hundred feet to the left of the runway the left wing dipped (169a). The Captain immediately ordered full power for a go-around and the plane leveled off. This order was executed by the co-pilot who simultaneously retracted the gears. At this point the plane, according to Lewis, was at an altitude of between 20 to 50 feet (170a). The co-pilot denied that he heard the Captain's order to retract either the gears or the flaps (169a, 340a)—a command heard by Forbes (315a, 79a). It is significant to note that the distance between the Captain and co-pilot was about two feet with Forbes seated immediately between them and slightly to the rear, and just a "matter of inches" away (331a).

Lewis testified that after full power had been ordered he feathered the No. 4 engine on his own responsibility and without advising the Captain (170a-171a). Simultaneously, he radioed the tower that the plane was lost. By this time the plane had progressed 800 to 1000 feet further over the field (171a).

By way of explanation the co-pilot testified that the tachometer indicated that the No. 4 engine was not developing power (341a) thereby creating an aerodynamic drag (179a).

He contradicted himself by further stating that the plane was in a climbing left stall immediately before he feathered the No. 4 engine—an evident impossibility if power was not being generated from the right side. He acknowledged that the flaps had not been retracted from full braking position (168a).

Lewis concluded his testimony by stating that he did not consider Captain Claude to be competent (371a), a belief not shared by the jury.

REASONS FOR GRANTING WRIT

POINT I

The judicial pronouncement that wilful misconduct had not been established constituted an unwarranted intrusion into the jury's exclusive province and resulted in a denial of the constitutional right to a jury trial.

The authorities are legion that it is the jury's, and not the Court's, function to weigh evidence. Similarly the jury is the sole and exclusive judge of credibility. Courts are not free to substitute their judgment for the factual findings of a jury merely because the Court might have come to a contrary conclusion. It is only where there is no evidence of substance upon which reasonable men might base a determination that a Court may intervene.

In *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, this Court reaffirmed this principle and held:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain references. The focal point

> of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most desirable. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co.,* supra, 68; *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored" (p. 35).

The basic issue presented in this application was before the Court in *Lavender* v. *Kurn,* 327 U. S. 645, 652-653, where a jury verdict was reinstated in a wrongful death action. The critical question was whether the decedent was murdered or killed by a mailhook protruding from one of defendant's trains. The opinion of the Court notes:

> "* * * The jury having made that inference the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury * * *.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute

> by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

See also: *Jacob* v. *N. Y. City*, 315 U. S. 752; *Gunning* v. *Cooley*, 281 U. S. 90; *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184.

This Court, in an analogous situation, *Union Trust Co.* v. *Eastern Airline*, October 1955 Term, #298, decided December 5, 1955, granted certiorari and simultaneously reversed the judgment of the United States Court of Appeals for the District of Columbia.

In this case, the trial court was meticulous in setting forth the applicable law in its charge to the jury. After the verdict was returned, it then unexplainably ignored its own instructions and set aside the jury's verdict. In so doing the Court in its opinion wandered through the record, selecting at random that which it chose to believe or rely upon and usurped the jury's prerogative.

The trial court conceded that the jury had the right to accept the testimony of Claude and Forbes, that the No. 4 engine was developing power and reject Lewis' claim that

it was windmilling.* It went further however and erroneously held that the pre-empting of the Captaincy by Lewis knowingly and contrary to Civil Air Regulations, is insufficient to base a finding of wilful misconduct. The Court erred when it ruled that petitioner was required to reject by affirmative testimony Lewis' explanation for his action in feathering the No. 4 engine. This would be tantamount to absolutely accepting Lewis' claim that he had used his best judgment in an attempt to save the plane, unless contrary intention were affirmatively and directly proved. Such a proposition violates the most elementary propositions of the law of evidence.

The trial court in setting aside the verdicts noted in part that:

> "* * * Flight Officer Lewis admitted that Captain Claude was in control of the plane on the approach to Love Field; that the No. 1 engine had been feathered previously. He was aware of Civil Air Regulations which specified that the Captain was in command of the flight** and was authorized to make decisions in an emergency† nevertheless, he took it upon himself to feather the No. 4 engine at a time when he knew Captain Claude was following emergency procedure for a go-around."

---

*Respondent's witness, Captain Sperry, testified that a windmilling propeller would create a "tremendous drag" and have an anchor-like effect on the right side (262a-263a). This would have forced the plane to go to the right. However, Lewis' own flight plan (424a) has the plane going to the left at all times, a fact which was conceded.

**Reg. Sec. 61.301, 14 CFR 725.

†Reg. Sec. 61.310, 14 CFR 727.

The trial court concluded:

> "As between Claude and Lewis, the jury could have believed Claude that the engine was developing power and not windmilling. Of course, resolving this issue in favor of Claude does not justify a finding of wilful misconduct.
>
> *"There would be required, in addition, a rejection of Lewis' explanation of his action."*

Continuing the Court said (App. 25a):

> "Therefore, if the jury based its verdict upon Lewis' violation of the Civil Air Regulations in preempting the Captain, the evidence was insufficient to find wilful misconduct. It may not be said that Lewis' feathering of the No. 4 engine—*a violation though it is,* was performed knowing that it would probably result in injury or was performed in such manner as to imply a reckless disregard of its consequences. *From the undisputed evidence* he used his judgment in an attempt to save the plane and this is not, under circumstances, wilful misconduct." (Emphasis supplied.)

The fallacy of this point is that the Court confuses intent with motive. Lewis' acts were intentional, deliberate and knowingly performed, and therefore were wilful. Since his acts violated the Civil Air Regulations they constituted misconduct and it follows that his wilful misconduct was established as a substantial contributing factor to the accident. cf. *American Airlines* v. *Ulen,* 186 F. 2d 529 (C. A. D. C. 1949). This is especially so as the jury found that no split second decisions were involved.

The jury found that Lewis did not use his "judgment in an attempt" to save the plane but deliberately, knowingly and contrary to specific command attempted to crash

land and thereby brought about the plane's destruction. Wilful misconduct, as this term is employed in the Warsaw Convention, does not require knowledge on the part of Lewis before the event that the plane would crash and that 28 of the passengers would perish.

The opinion of the Appellate Court below correctly defined the term wilful misconduct as follows:

> "The instructions required proof of 'a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.' This was in accordance with precedent. *American Airlines* v. *Ulen*, 186 F. 2d 529 (D. C. Cir. 1949); *Pekelis* v. *T.W.A.*, 187 F. 2d 122 (2 Cir. 1951); *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105 (1952), aff'd 305 N. Y. 830, certiorari denied, 346 U. S. 874."

It is apparent from a gleaning of this definition that petitioners were not required to prove that Lewis was possessed of a suicidal intent or that he was clairvoyant and could foretell with exactness what the outcome of his mutinous actions would be. What is obscure is the basis of the Court's apparent reversal of the holding of the *Pekelis* case, while citing it with approval in its definition of wilful misconduct. In the *Pekelis* case a mechanic performed a test "used by most mechanics" instead of the required one. The Court clearly indicated that it was for a jury to determine whether on the basis of this evidence the mechanic knew that this violation was likely to cause injury to a passenger. *Pekelis* v. *T.W.A.*, *supra*.

The verdict of the jury is fully supported by competent proof that:

1) Lewis was attempting, contrary to the orders of his captain, to bring the plane in for a crash landing with the gears up and the flaps in a full braking position;

2) Lewis was fully aware that the feathering of the No. 4 engine would commit the plane to a crash as only two engines would be developing power;

3) Lewis acted intentionally because he considered his Captain to be incompetent;

4) Captain Claude was an experienced qualified pilot with over twenty years' experience and with 20,000 hours flying time; co-pilot Lewis was not qualified to pilot a DC-6 and had only qualified in 1947 as a two-engine pilot;

5) The plane was, in fact, climbing with full power in three engines for a go-around and had risen above the level of the hangars when the No. 4 engine was feathered;

6) There was no aerodynamic drag created by the No. 4 engine;

7) The plane was not, contrary to the opinion of the Court of Appeals, in *extremis* until Iewis feathered the No. 4 engine;

8) No split-second situation was present, as claimed by Lewis, as there was an interval of upwards of one minute between the time Forbes noted a zero reading of the No. 4 fuel gauge and the crash;

9) Lewis contradicted himself when he admitted the plane was going to the left since this could be accomplished only by power developing from the starboard No. 4 engine;

10) Lewis lied when he testified that he did not hear the Captain's order to raise the gears and flaps to take-off position;

11) Lewis' failure to sing out that he was feathering No. 4 engine was consistent with his plan to disobey the Captain's instructions; otherwise, the natural thing would have been for him to yell out and warn the Captain;

12) Lewis' explanation was not worthy of belief and was the product of afterthought.

Only where no possible view of the evidence, considering it with all reasonable inference most strongly against respondent and in favor of petitioners, may judgment notwithstanding the verdict be entered. The Court of Appeals in its opinion recognized that rule by stating that the jury's finding of wilful misconduct could only be disturbed "if, on no possible view of the evidence, could reasonable men reach that conclusion". The Court then reviewed the facts and noted:

> "If defendant had the burden of proving that there was no wilful misconduct on the part of any member of the crew, we think a jury would have been warranted in finding on this record that the burden had not been sustained. * * * "

From this it would appear that viewing the evidence most strongly against the petitioners and in favor of the respondent, as the Court erroneously did, at best the scales were equally balanced. Quite clearly the Court itself was weighing evidence. This constituted error. If there was *any* evidence which would sustain the verdict, the motion for judgment absolute must be denied. *MacKay* v. *Costigan*, 179 F. 2d 125; *Kaminski* v. *Chicago R. & I. Co.*, 200 F. 2d 1. If the Court could weigh evidence then there was sufficient in the record to compel a denial of the respondent's motion.

POINT II

The Courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness.

The Courts below recognized that implicit in the jury's verdict was a finding in favor of the plaintiffs' version of the crash as testified to by Claude and Forbes. The Courts below however, ruled that petitioners were required additionally to reject Lewis' explanation for his wrongful actions by affirmative testimony.

It has long been recognized that where the credibility of an interested witness has been impaired a jury may reject any part or all of the witness' statements even where they are not directly contradicted. *Quok Ting* v. *U. S.*, 140 U. S. 417; *Sonnentheil* v. *Christian Morelein Brewing Co.*, 172 U. S. 401. *Broadcast Music Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d 77 (C. A. 2, 1949); see also *N. L. R. B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C. A. 9, 1953); *Dyer* v. *MacDougall*, 201 F. 2d 265 (C. A. 2, 1952); *People* v. *Tuczkewitz*, 149 N. Y. 240 (1896).

Lewis was well aware that it was the petitioners' claim that his wilful misconduct caused the crash of the respondent's aircraft and the death of 28 passengers. Lewis is an employee of the respondent. His position and future advancement with the respondent, it can be assumed, depended upon the jury's finding. It is therefore, apparent that Lewis had a motive to conceal his true actions from the jury. The elementary rules of evidence dictate that where, as here, an interested witness' testimony has been rejected in all material respects by the trier of the facts, it would be folly to rule that the witness' explanation must be allowed to stand as truthful. Uncontradicted testimony

cannot be withdrawn from a jury's scrutiny where serious questions of credibility have been raised as to an interested witness' testimony. In so doing the courts below further departed from their function and invaded those of the jury.

POINT III

Failure to comply with the provisions of the Warsaw Convention bars respondent from limiting liability thereunder.

Article 3 of the Warsaw Convention (49 U. S. Statutes 3015) provides as follows:

> "Article 3. (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this conven-

> tion. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

It is conceded that the air passenger tickets issued to the petitioners' parents did not set forth the agreed stopping places as provided in Article 3 (1) (c). The question thus presented as stated by the District Court is "whether Article 3 (2) means that unless a ticket with all the particulars as set forth in Article 3 (1), is delivered, the carrier's liability is unlimited" (95 F. Supp. 756, 758).

An examination of Articles 4 (4) and 9 reflect that the draftsmen of the Warsaw Convention denied carriers the right to limit liability where baggage checks and waybills did not strictly conform to the articles of the Convention. The District Court alluded to these provisions but concluded that since specific provision denying protection to the carrier was contained therein but omitted from Article 3, that therefore the draftsmen did not intend to deny the protection of limited liability for non-compliance. The provisions of the Convention are in derogation of the common law and must be strictly construed against the carrier. In light of the foregoing, strict compliance with all the terms and requirements of the Warsaw Convention should be a condition precedent to a limitation of liability.

It is inconceivable that the draftsmen of the Convention ever intended to require the carrier to exercise a greater degree of care when dealing with baggage and cargo than with passengers.

Article 3 was intended to advise passengers of the jurisdictions under which they might become subject and the

number of landings and take-offs in advance of the flight. This is of importance when it is borne in mind that the hazards of air travel are greatest during take-off and landing. A passenger should be apprised of those places where the plane will stop to give to him an opportunity to consent to his becoming subject to the laws of foreign jurisdictions. Similar notification should be given to a passenger flying from New York to Mexico City with relation to domestic landing and take-offs as the laws of the several states are materially different.

Any other conclusion would do violence to the mandatory language in Article 3 that the ticket "must" and "shall" contain these particulars.

POINT IV

The verdicts were not excessive and should not have been set aside.

The verdicts returned by the Jury are as follows:

For the Death of Harry M. Goldberg
Howard M. Grey.....$50,000.00
Doris Sylvia Grey.... 30,000.00

For the Death of Sophie Goldberg
Howard M. Grey.....$5,000.00
Doris Sylvia Grey..... 5,000.00

The trial court set aside these verdicts as excessive inso far as they exceeded the sum of $8,300. as to each decedent and ordered a new trial only in the event the judgment setting aside the verdicts under Rule 50(b) was reversed.

The applicable criteria for determining damage under Texas Law were correctly stated by the trial court in its opinion (29a).*

Petitioners' father, Harry M. Goldberg, was 47 years of age at the time of his death and had a life expectancy of 23.08 years. He was employed as head of production (246a) of a leading national advertising agency where he had worked continuously for a period of 32 years (248a). He received a salary of $12,500.00 per year (248a) and as a stockholder of the firm received a share of the profits. At the time of his death his 5-year accumulation in the profit-sharing plan totalled $5,861.49 (249a). He was in excellent health and was one of the top production men in the advertising field. In all probability he would have been made a vice-president of the company with an increase in salary and a greater participating interest in the profit-sharing plan (251a).

The petitioners' mother Sophie Goldberg was a 42 year old housewife at the time of her death with a life expectancy of 26.72 years. She was a retired school teacher and was in excellent health (56a).

The petitioners resided with their parents in a private home purchased by their parents in 1940. They were "a very devoted and closely-knit family" (52a).

---

*"I charge the jury that in awarding damages they should take into consideration the following:

1. Pecuniary loss of contributions of each parent for support, education and so forth during minority.

2. The value of the services which each parent might and would have rendered in training and educating the children during minority.

3. The loss of reasonable contributions each child might receive after majority from the parent.

4. The loss of prospective accumulations of the parent during his or her lifetime" (29a).

The petitioner Howard M. Grey was 17 years of age at the time of his parents' death. He was enrolled in a pre-Medical course at the University of Pennsylvania having previously been graduated from Horace Mann High School. His tuition and all of his expenses had been paid by his father. At the time of the trial he was attending New York University School of Medicine.

The financial demands upon the parents of a medical student are great. They are required to contribute not only toward his support and medical school tuition but also to his support during internship, residency and during the infancy of a private practice. In many instances they are called upon to bear the expense of post graduate study and research. Under the circumstances reasonable men could find that the cost of such medical education alone would have amounted to approximately $25,000.00.

The petitioner Doris Sylvia Grey was twenty years old at the time of her parents' death. She had attended private schools, all of the expenses for which had been paid by her father (241a). She was engaged to marry a young man with her parents' knowledge and consent (240a) at the time of the accident and after the accident was married in February 1950. Her husband was not self-supporting and was studying podiatry. At the time of the trial he was working as a laboratory assistant at a local hospital (240a).

An award of $35,000.00 to the petitioner Doris Sylvia Grey was reasonable and proper. The jury had a right to conclude that her father would have advanced in his employment with resultant increases in salary and in his participation in the profit-sharing plan. Her father's firm was not a small local advertising agency,—it employed 650 people and maintained offices in several of the large cities throughout the country. Her father had not reached the peak of his business or earning capacity.

The verdicts are not in conflict with Texas law. Wide latitude must be given to the jury and its determination must stand "unless the amount assessed admittedly reflects the unfriendly feelings and unworthy motives * * *." *International-Great Northern R. Co.* v. *Acker,* 128 S. W. 2d 506. Court of Civil Appeals of Texas.

In *Texas & P. Ry. Co.* v. *Riley,* 183 S. W. 2d 991, the Court of Civil Appeals of Texas refused to set aside a $30,000 verdict as excessive for the death of a 35 year old railroad employee who was earning $125 per month plus board and lodging. There, as in the instant case, the proof was that deceased took pride in his family and had a keen interest in his children's education. After alluding to these facts, the Texas Court held that the verdict was not excessive and said in part:

> "* * * Under all the circumstances here we are not prepared to say that the damages assessed are excessive. Certainly there is no fact in this record to show that the jury was activated by any ulterior motive in making this assessment. Appellee's measure of damages was great and it must be remembered that it did not depend solely upon monetary contributions by the deceased husband and father" (p. 995).

Ordinarily this Court will not review the discretionary action of the trial court in either granting or denying a motion for a new trial; *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474. In this instance however, the trial court ruled that there was no factual basis for the awards. The least that can be said is that the opinion of the Court suggests a predisposition against the jury system as this is the final attempt by the trial court to preempt the jury's lawful function. Here the trial court did not exercise discretion in reversing the facts, rather it ruled

as a matter of law that facts were absent which the record clearly belies. It cannot be said on this record that the jury was acting out of sympathy in awarding the petitioners a verdict in the aggregate sum of $90,000.00 in 1954 for the loss of two comparatively young parents.

CONCLUSION

The decisions below represent a gross and an alarming departure from our constitutional jury tradition. They are apparently grounded upon the apparent indifference to the jury's exclusive province of weighing evidence and resolving credibility. The supervisory jurisdiction of this Court should be exercised so as to prevent and discourage this growing practice.

For the foregoing reasons this petition for certiorari should be granted, the judgments below reversed and the verdicts reinstated.

Respectfully submitted,

ARTHUR M. LAUFER,
Attorney for Petitioners.

Of Counsel:

JOHN M. FOLEY,
SAMUEL S. STURIM.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

No. 73—October Term, 1955.

(Argued October 7, 1955 Decided November 7, 1955.)

Docket No. 23601

—o—

[SAME TITLE]

—o—

Before:

HAND, MEDINA and LUMBARD,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York. Edward A. Conger, *Judge.*

Plaintiffs appeal from an order setting aside verdicts in favor of plaintiffs and directing judgment in favor of plaintiffs in the amount of $16,600 only. Affirmed.

MANES, STURIM, DONOVAN & LAUFER, New York City (Arthur M. Laufer and Samuel S. Sturim, New York City, on the brief), *for plaintiffs-appellants.*

HAIGHT, GARDNER, POOR & HAVENS, New York City (William J. Junkerman and James B. McQuillan, New York City, of Counsel), *for defendant-appellee.*

MEDINA, *Circuit Judge:*

The parents of the infant plaintiffs and twenty-six other persons met their deaths during the early hours of the morning of November 29, 1949, when defendant's Douglas

DC-6 airplane, on an international flight from New York to Mexico City, crashed at Love Field, Dallas, Texas.

While plaintiffs contended that the Warsaw Convention was not applicable, because the passenger tickets issued to decedents did not make reference to the intermediate "agreed stopping places"[1] of Washington, D. C., and Dallas, Texas, motions to strike the usual Warsaw Convention limitation of liability defenses, based upon this technical and wholly unsubstantial alleged omission, were denied before trial by Judge Noonan. We agree with Judge Noonan's reasoning and see no occasion to elaborate upon his carefully prepared opinion. *Grey* v. *American Airlines*, 95 F. Supp. 756 (S. D. N. Y. 1950).

At the trial the principal issue was whether or not plaintiffs had adduced evidence sufficient to support a finding that the disaster was due to "wilful misconduct" on the part of defendant's employees, or any of them. The jury found that it was; but the trial judge, after taking under advisement defendant's motion to set aside the verdicts and direct judgment in favor of plaintiffs for $16,600, or the limited amount of $8300 on account of the death of each decedent, reviewed the evidence in some detail and, in the order now appealed from, granted the motion.

In limine plaintiffs contend that the trial judge lacked power to entertain the motion, at least with reference to so much of plaintiffs' claim as arises out of the death of the mother, Sophie Goldberg, under F. R. C. P. 50(b), because no motion for a directed verdict was made by defendant "at the close of all the evidence" to the effect that the jury should find in plaintiffs' favor for the sum of $8300 "arising out of the death of Sophie Goldberg." We had supposed the winds of time had long since carried into oblivion such flimsy excuses for avoiding a consideration

1. Presidential Proclamation of October 29, 1934, 49 Stat. Pt. 2 at p. 3000 *et seq.*

of the merits of a case. From the outset defendant urged that there could be no recovery in excess of $8300 for the death of either decedent; motions for directed verdicts with respect to the claims arising out of each of the two deaths were made at the close of plaintiffs' case; the contention was again made *in extenso* at the close of all the evidence. It was mere inadvertence that no reference was again made specifically to Sophie Goldberg. Accordingly, the trial judge had ample authority under Rule 50(b) to set aside or disregard the verdicts and dispose of the case with finality, subject to appellate review.

The plane left La Guardia Airport at 10:30 P. M.; took off from Washington, D. C., for Dallas at 12:54 A. M., and, when in the vicinity of Nashville, Tennessee, the outboard engine on the port wing, known as the #1 engine, commenced to backfire, as a result of which it was feathered and shut off. Without further incident Dallas was sighted and the plane was cleared to land on runway 36. We are concerned with what occurred between the time the plane crossed the boundary of the airport at an altitude of 200 feet, until it crashed on top of the hangar of the Dallas Aviation School on the edge of the airport opposite the direction tower. The crew, consisting of the Captain, the First Officer and the Flight Engineer, survived; and their testimony gives us a certain amount of data, together with some flat contradictions and a mass of conflicting possible inferences. Before giving a brief resume of the evidence, it will be well to set forth the applicable law.

The scheme of the Warsaw Convention is pretty plain on its face. Chapter III is the one which concerns us here. Article 17 imposes an absolute liability upon the carrier for all personal injuries, regardless of fault, "if the accident which caused the damage so sustained took place on board the aircraft." But this liability is excused by Article 20(1), if "the carrier proves" that it "has taken all necessary measures to avoid the damage or that it was impos-

sible" for it to take them. As to this it is plain that the burden of proof is upon the carrier. And, in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be almost if not quite insurmountable.

Against this background we come to Article 25, which provides that the carrier shall not be entitled to avail itself "of the provisions of this Convention which exclude or limit" its liability, if the damage is caused by its "wilful misconduct." The exclusion refers to Article 20(1), and the limitation to Article 22(1), which provides that "the liability of the carrier to each passenger shall be limited" to $8300. Upon whom is the burden of proving wilful misconduct?

The trial court here instructed the jury that the burden of proving wilful misconduct rested upon plaintiffs, and plaintiffs acquiesced in this, virtually conceding that it was not incumbent upon defendant to sustain the onus of proving a negative. As will shortly appear, the real cause of the crash still remains in doubt, and we feel that the interest of justice requires that we decide this question, even though the parties have apparently taken the answer for granted.

We hold that the trial judge ruled correctly when he charged the jury that plaintiffs could recover no more than $8300 on account of the death of each decedent, unless plaintiffs proved by a fair preponderance of the credible evidence that there was wilful misconduct on the part of defendant's employees, or any of them, which was a "substantial contributing factor" to the accident. The specific language of Article 20(1), above quoted, and the absence of corresponding words in Article 25 would seem to make admissible no other interpretation of the Convention. But perhaps of greater significance is the general purpose of protecting international air carriers from the burden of

excessive claims connected with the loss of aircraft under circumstances which make it impossible, or virtually so, to determine the mechanical or human shortcomings which caused the disaster, because of the death of all on board and the destruction of the plane. We find implicit in the terms of the Convention an intention to relieve the carriers of this burden of proof, whilst at the same time giving the injured parties the opportunity to prove wilful misconduct, if they can.

There is no dispute as to what constitutes wilful misconduct. The instructions required proof of "a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." This was in accordance with precedent. [*American Airlines* v. *Ulen*, 186 F. 2d 529 (D. C. Cir. 1949); *Pekelis* v. *T. W. A.*, 187 F. 2d 122 (2 Cir. 1951); *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105 (1952), aff'd 305 N. Y. 830, certiorari denied, 346 U. S. 474.]

Moreover, as this is a jury case, plaintiffs are entitled to have the evidence viewed in the light most favorable to plaintiffs. All questions of credibility were for the jury. It was within their province to pick and choose, to accept a part or the whole of the testimony of any particular witness, and to reject the rest. Where conflicting inferences were rationally admissible, it was a function of the jury to take those which they considered most consistent with the general pattern of the proofs. And this congeries is summed up in the general verdicts. The trial judge had a right to reject the finding of wilful misconduct only if, on no possible view of the evidence, could reasonable men reach that conclusion. *Binder* v. *Commercial Travelers*, 165 F. 2d 896 (2 Cir. 1948); 3 Moore, Federal Practice §50.01 (1938).

We now return to the evidence of the events which crowded into the brief interval of time between the crossing of the boundary of the airport at a height of 200 feet and the crash.

The Flight Engineer suddenly reported that the fuel flow gauge on engine #4, the outboard starboard engine, read zero. The Captain at once ordered the fuel booster pump applied, and the Captain testified that he felt that engine "surge," which caused the left wing to dip 20° and the plane to swerve to the left and out of line with the runway. Reduction of power on the #3 and #4 engines and increase of power on #2 apparently brought the plane level and she was about 30 or 40 feet above the ground. The Captain says he ordered the landing gear retracted and the flaps raised, with full take-off power on the three operating engines. The First Officer says he did not hear any order but knew from the actions of the Captain that he was attempting to pull up and make another try for the field. That the plane gained altitude is apparent from the fact of where she hit on top of the hanger of the Dallas Aviation School.

But in the interval, without any order from the Captain, the First Officer feathered the #4 engine, and the Captain claims that this was what caused the crash. The First Officer says the instruments indicated that #4 was "windmilling," that the unfeathered propeller without power behind it would operate as a drag, and that he left the flaps as they were because to level them off would, in his opinion, have resulted in an immediate loss of altitude. There was testimony that there was still power in #4 and that the levelling of the flaps would have helped the plane to rise, although this seems improbable in view of her position so close to the ground. In any event, the plane stalled and fell.

If defendant had the burden of proving that there was no wilful misconduct on the part of any member of the crew, we think a jury would have been warranted in finding on

this record that the burden had not been sustained. There are too many gaps and imponderables, to say nothing of the conflicts and inconsistencies, some of which we have not thought it necessary to collate.

But we cannot discover anything in the case to warrant a finding that there was wilful misconduct. It is said that the Captain was in command and that he was the only one authorized by Civil Air Regulations 61.301, 61.310, to act in an emergency. But we find nothing in the Regulations to justify this conclusion. The plane was *in extremis;* whatever the First Officer did or failed to do was done to save the plane and the lives of all on board including his own.

True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record is still devoid of any evidence of wilful misconduct.

Much is also said on plaintiffs' behalf of defective instruments and previous backfiring by the engine which was feathered when near Nashville, but it is abundantly plain to us that each and every member of the crew thought the plane was airworthy when they left Washington, D. C. for Dallas; and the evidence referred to is of trivial consequence.

Other alleged errors seems to us not to warrant discussion.

Affirmed.

Opinion of United States District Court, Southern District of New York

[SAME TITLE]

APPEARANCES:

MANES, STURIM, DONOVAN & LAUFER, ESQS., Attorneys for Plaintiffs, 70 Pine Street, New York 5, N. Y.
JOHN J. DONOVAN, JR., ESQ.,
ARTHUR M. LAUFER, ESQ.,
Of Counsel.

HAIGHT, DEMING, GARDNER, POOR & HAVENS, ESQS., Attorneys for Defendant, 80 Broad St., New York 4, N. Y.
WILLIAM J. JUNKERMAN, ESQ.,
JAMES B. MCQUILLAN, ESQ.,
Of Counsel.

CONGER, D. J.:

Defendant moves for the following relief:

(1) to set aside the verdicts of the jury and for judgment dismissing the complaint in amounts in excess of $8,300 for each passenger; and in the alternative.

(2) a new trial upon the grounds that the verdicts are contrary to the evidence and law and are excessive.

The jury returned verdicts as follows:

For the death of Harry M. Goldberg:
Howard M. Grey.....$50,000
Doris S. Grey..... 30,000.

For the death of Sophie Goldberg:
Howard M. Grey.....$ 5,000
Doris S. Grey.....$ 5,000.

The evidence disclosed that the decedents, father and mother of the infant plaintiffs, were killed in the crash of defendant's Douglas DC-6 airplane, upon which they were passengers, at Love Field, Texas, on November 29, 1949.

The principal issue at the trial was whether the deaths were caused by wilful misconduct upon the part of defendant's agents.* The jury's verdicts reflect an affirmative resolution of this issue.

(1) Defendant now contends, as it did at the end of plaintiffs' case and at the close of the evidence, that, according every reasonable inference to the evidence, it was insufficient to sustain a finding of wilful misconduct.

There is a dispute between the parties concerning the plaintiffs' obligation to "specify" the acts of wilful misconduct.** Certainly, there is no specification in the complaint unless the general allegations of paragraph 17 may be so regarded. Plaintiffs' counsel did specify certain acts

---

*Article 25 of the Warsaw Convention (49 Stat. Pt. 2, pp. 3000 *et seq.*) provides as follows:

> "(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.
>
> "(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

Unless the plaintiffs prove wilful misconduct, then recovery is limited to $8,300 per death in accordance with Article 22 of the Convention.

**In *Froman* v. *Pan American Airways*, Supreme Court, N. Y. County, aff'd without opinion by the Appellate Division, 1st Dept. (N. Y. L. J. Nov. 4, 1954), the Trial Judge charged the jury that the plaintiffs are required to specify the acts of wilful misconduct.

in his opening statement. Whether or not this practice discloses sufficient specification at this point, I am not prepared to say. In his summation, plaintiffs' counsel again alluded to acts of wilful misconduct and some time before the end of the trial, plaintiffs' attorney gave me a paper which contained "Plaintiffs' specifications of wilful misconduct on the part of the defendant." My recollection is that this paper was given me by plaintiffs' attorney the evening before the summations were to start. In his opening and summation plaintiffs' attorney did not refer specifically to this list of specifications but my recollection is that he did refer particularly in his summation to acts and conduct of defendant's employees which he characterized as acts of wilful misconduct.

Defendant's attorney stated in the argument on this motion that this paper was handed to him just as he got up to make his summation; that he never read it until the case was over.

It seemed to me that this list summarized in effect those acts of wilful misconduct which plaintiffs' counsel had referred to in his opening and summation. This list was not read to the jury nor incorporated in the charge. At the end of the charge the attorney for defendant excepted to my failure to charge defendant's request to charge No. 8, to the effect that plaintiffs be required to specify what act or acts they claimed constituted wilful misconduct.

I refuse to so charge because I felt that after giving to the jury instructions as to what constituted wilful misconduct as applied to this case, it was its duty and obligation to view the evidence and ascertain under the yardstick of the law I had given them, whether any act or acts of wilful misconduct had been proven by plaintiffs.

The list submitted follows:

> "a. That defendant's First Officer Robert E. Lewis, in violation of all laws, rules and regulations,

with knowledge that No. 1 engine was feathered, deliberately and with intent feathered #4 engine while the Captain in command of the plane was then and there in control of the said aircraft and in the process of maneuvering the same for the purpose of gaining altitude or applying power to the said engines for the purpose of effecting a safe and proper landing under the circumstances by going around again for a new approach and landing.

b. That the said defendant by its First Officer Lewis, with full knowledge of the probable consequences of such act, omitted to comply with the orders of the Captain in command of the said flight, to raise the flaps from fully extended position at the time the gears were retracted for the purpose of a 'go around' for a new landing.

c. That Captain Sperry on preceding flight #48 of Nov. 28, 1949 omitted to report the backfiring and trailing of smoke from #1 engine while over Advance, Missouri at an altitude of 17,000 feet with knowledge of the fact that the defect of such engine if not corrected would probably result in injury or damage to passengers.

d. That the defendant by its agents, servants and employees committed an act of wilfull misconduct by continuing said airplane in service transporting passengers, with full knowledge of the previous defective condition of engines #1 and #4 known to defendant's mechanics, inspectors, pilots and agents to exist for a considerable period of time despite previous corrective action taken.

e. That the defendant committed an act of wilfull misconduct in permitting flight 157 to take off from LaGuardia Field at the time and place of de-

parture with knowledge of the defects in engines #1 and #4 without requiring check flight test.

f. That the defendant, its servants, agents and employees permitted the said plane to continue in service transporting passengers without making necessary repairs or taking necessary action because of inability to obtain new parts or because they did not have time or something of that nature.

g. That with knowledge of the existing condition of the said airplane on November 28-29, 1949, the defendant's servants, agents or employees committed wilfull misconduct in permitting said airplane which was not airworthy to continue in service carrying passengers and cargo close to its maximum load limit without going immediately to the nearest airport and landing and obtaining new equipment."

I charged the jury as follows:

"In order to determine whether there was wilful misconduct, the first thing that must be understood is what is meant by wilful misconduct. I charge you that wilful ordinarily means intentional, that the act that was done was what the person doing it meant to do, but this phrase, wilful misconduct, means something more than that. It means that in addition to doing the act in question, the actor must have intended to do that act, or with respect to that act he must have launched on such a line of conduct with knowledge of what the consequences probably would be, and have gone ahead recklessly, despite his knowledge of those consequences. In order that the act may be characterized as wilful, there must be on the part of the person or persons sought to be charged, a conscious intent to do or omit doing the act from which harm results to an-

other, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.

Now, to put it with the same ultimate definition, but in other words, I should give you another definition which does not in any way take away from what I have just now said, but I think perhaps explains it a little more fully. I shall explain to you again what wilful misconduct in this case is. It does not mean that the defendant or any of its employees had a deliberate intention to kill the decedents or to wreck this airplane. Wilful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences of the performance of the act. Likewise, the intentional omission of some acts with knowledge that such omission will probably result in damage or injury, or the intentional omission of some acts in a manner from which it could be implied reckless disregard of the probable consequences of the omission, would also be wilful misconduct.

Of course, if you determine that there was no such wilful misconduct, then you must stop right there as to that and turn to the other facet of the case, the first facet of this case, which contains a limitation of liability. That is Section 20.

If, however, you find that the defendant or any of its employees committed one or more acts of wilful misconduct, then you must go on and consider whether or not such wilful misconduct as you have found was the proximate or legal cause of the death of these decedents."

See *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105 (1st Dept.), 152, aff'd without opinion, 305 N. Y. 830; cert. den. 346 U. S. 874; *Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. (2d) 122 (C. A. 2, 1951); cf. *American Airlines* v. *Ulen*, 186 F. (2d) 529 (C. A. D. C. 1949).

There is no doubt that specification (a) is true insofar as the related facts are concerned and without the legal conclusions. Flight Officer Lewis admitted that Captain Claude was in control of the plane on the approach to Love Field; that the No. 1 engine had been feathered previously. He was aware of Civil Air Regulations which specified that the captain was in command of the flight* and was authorized to make decisions in an emergency.** Nevertheless, he took it upon himself to feather the No. 4 engine at a time when he knew Captain Claude was following emergency procedure for a go-around. Lewis testified on direct as follows:

> "Q. What happened? A. Approximately a half mile from the south boundary of the field before he had got lined up, Mr. Forbes advised him that No. 4 engine was failing.
>
> Q. No. 4 was failing? Or did he mention something about fuel flowage? A. I don't know to this day whether he said No. 4 engine is going out, quitting, failing, but he implied to both of us that No. 4 engine was having difficulty.
>
> Q. Whatever he said, he gave you the immediate impression that No. 4 engine had failed? A. That is right.
>
> Q. What happened after that? A. Captain Claude asked—he didn't ask—he merely said, 'Try the booster pump to No. 4 engine.'

---

*Reg. § 61.301, 14 CFR 725.

**Reg. § 61.310, 14 CFR 727.

Q. Try the booster pump to No. 4 engine? A. Yes.

Q. Who did apply the booster pump to No. 4 engine? A. Mr. Forbes.

Q. Did you see him do that? A. Yes.

Q. After he did that— A. Now, I would like to—I didn't see him actually apply the pump; I saw his hand go up in the air toward the panel. Whether the pump ever turned on I don't know.

Q. Now, what was the next thing that you observed? A. I observed that the airplane was rapidly losing air speed and drifting to the left of the runway.

The Court: What was that?

The Witness: I observed that the airplane was rapidly losing air speed and drifting further to the left of the runway.

Q. What was the speed of the plane at that time when you observed the plane rapidly losing altitude, after you saw Mr. Forbes reach out for the booster pump? A. Approximately 110 miles an hour.

Q. What is the stalling speed of that plane? A. I can't answer that question unless—an airplane has different stalling speeds: Clean stall, partial gear extension stall, full flaps stall.

Q. Let me ask you this: With full flaps, with the landing gear down and with the flaps fully extended, as that plane was in, with the load it had under those conditions, approximately what was the stalling speed? A. I would have to have a chart to tell you accurately. Approximately 90 miles an hour.

Q. Now, you say you saw the plane losing altitude and drifting more to the left of that north and south runway? A. Yes.

Q. How far was the plane at that time from the edge of that runway or the boundary of the field when you saw this happen? Were you inside the boundary of the field by that time? A. It was all simultaneous, traveling along. At approximately 110 to 120 miles an hour, a quarter of a mile from the field, you are actually over the field in a very short period of time.

Q. Just a matter of seconds? A. Yes, it is.

Q. So you can't say exactly where it was at that time with respect to that runway? A. Progessively approaching the end of the runway, drifting to the left of it, and continuing to drift to the left of it.

Q. With that situation as it was, what was the next thing you observed happen? A. The airplane dropped the left wing.

Q. In other words, the left wing came down? A. Yes.

Q. What did that indicate to you as a pilot? A. It indicated to me that the air plane was in an abnormal attitude to land out of.

Mr. Laufer: What was that last word?

The Witness: The airplane had assumed an attitude, that it would be almost impossible to effect a landing out of on the runway.

Q. What if anything did the captain do or say at that time? A. He immediately hollered for full power.

Q. For full power? And who gave full power? A. He applied it partially and I pushed it on by myself.

Q. In other words, you pushed the throttle forward? A. Yes.

Q. Did the left wing come up or did it start to come up, or what happened with respect to the left

wing? A. Well, at the time we were applying the power the aircraft had started to assume a normal attitude, with the full application of the right aileron control.

Q. Power didn't make any difference at that point? A. No.

Q. Did it come up to almost level position? A. Yes.

Q. That was while the plane was to the left of this runway? A. It was.

Q. By the time it returned level how far was the plane from the edge of the runway? A. You mean west of the runway?

Q. Either way. A. West of the runway. I would say we were probably two to three hundred feet.

Q. South of the runway? A. We were already inside the boundary of the field.

Q. Had you reached a point that was beyond the end of the runway as far as north and south was concerned? A. We had.

Q. So, if this were the runway, by this time you were up to a point about here (indicating)? A. Yes.

Q. By the time it became level? A. Yes.

Q. When you got to that point what did you see, what did you observe and what happened after that? A. Applied full power and I retracted the gear.

Q. Did the captain give an order to retract the gear? A. I didn't hear him give it, but it has been testified——

Q. I just want to know whether he gave it——

Mr. Laufer: Let him finish.

The Witness: I didn't hear him actually give the command to retract the gear.

Mr. Laufer: If your Honor please, he was saying something else when Mr. Junkerman interrupted him.

Q. Please say whatever you were saying when Mr. Laufer says I interrupted? A. I was going to say that it has been testified by both Mr. Forbes and Captain Claude that the order was given. I say I didn't hear it.

Q. Then why did you retract the gear? A. It was normal procedure in an emergency, a go-around.

Q. Did you think the captain was following emergency procedure for another go-around? A. Yes.

Q. Is that the reason you pulled up the gear? A. Yes, it was.

Q. You pulled up the gear. Did you make any attempt to pull up the flaps? A. No, sir.

Q. Why not? A. The air speed of the airplane was too low to retract.

Q. If you had retracted the flaps at that time what would have happened? A. The airplane would have immediately stalled where it was.

Q. How high were you above the level of the ground at that time? A. Approximately 20 feet.

Q. So the application or retracting the flaps, would have a tendency to immediately settle the plane, would it not? A. Yes, at that speed.

Q. Well, now, after you pulled the gear up, retracted the gear, what did you observe with respect to the No. 2, 3 and 4 engines? A. I observed that No. 4 engine had no fuel pressure, no fuel flow, manifold pressure was dropping, the tachometer indicated the engine was turning 1300 revolutions a minute.

Q. Did you look out to see the engine? A. No.

Q. You couldn't see it at that time, I suppose because of darkness? A. There was no need to look at it.

Q. Anyway, you didn't look? A. No.

Q. Were you able to see whether or not the propeller was windmilling?

Mr. Laufer: He just said he didn't look at it.

Mr. Junkerman: I am asking about the propeller now.

Mr. Laufer: Well, the propeller is on the engine.

Mr. Junkerman: I know that.

The Court: Could you see the propeller?

The Witness: I could have seen it had I looked at it.

The Court: You didn't look?

The Witness: No. My tachometer indicated that the engine was turning——

Mr. Laufer: I move to strike it out. The last part of the answer is not responsive.

Q. What did you look at to determine whether or not that No. 4 engine was turning up? A. The tachometer.

Q. What did you observe with respect to the tachometer? A. The engine was turning 1300 rpm.

Q. What does that mean to you as a pilot? A. To me, that the engine was windmilling.

Q. What effect would windmilling have upon the forward motion of the plane? A. It created drag. It would make it impossible, there would be so much drag to the airplane that it would be impossible to fly out of the field, or even continue level flight, for that matter.

Q. What did you do? A. I feathered the No. 4 engine.

Q. Feathering, then, would have the effect of minimizing the drag from that engine, would it? A. It would.

Q. After you did that what was the next thing you did or said? A. The airplane was already in a climbing left stall. I picked up the microphone and told the tower we were losing the airplane

and to get emergency equipment to the scene, or words to that effect.

Q. And right after that the accident happened? A. I also advised them we had just feathered No. 4 engine.

Q. And how soon a time after you said that did the accident happen? A. My transmission was cut off by the impact."

He testified on cross as follows:

"Q. Would the gear be retracted on a go-around to relieve drag? A. Yes, sir.

Q. And feathering No. 4 you say also relieves the drag? A. Yes, sir.

Q. It also stops the power, doesn't it? A. No, sir.

Q. There was no power being developed in your opinion? A. In my opinion there was no power being developed in No. 4 engine at the time it was feathered.

Q. Because you looked at the tachometer? A. I looked at the No. 4 engine——

Q. You said you looked at the tachometer. I think you said it was turning 1300 rpm? A. Yes, sir.

Q. Well, that is developing power, isn't it? A. No, sir.

Q. Well, idling it would be about 300 rpm, would it not? A. That is a different set of circumstances.

Q. Were you in court when Captain Sperry testified as to the speed at which the prop idled? A. I was.

Q. Did you recall him saying it idles at 600 to 800 rpm? A. I do.

Q. That anything above idling would be some thrust or power?

Mr. Junkerman: If your Honor please, I object to that. Captain Sperry was talking about on the ground and not in the air.

Q. Well, this is 20 feet off the ground. A. Sir, that is in flight.

Q. And you say that 1300 rpm shown on the tachometer 20 feet above the ground would be developing no power? A. No, sir. It is an absolute failure.

Q. How about 1800 rpm? A. It would depend on the manifold pressure being applied to the engine.

Q. Well, I assume at a moment like that you would be applying full maximum manifold pressure to get maximum power? A. Sir, the engine was not running, regardless of the position of the throttle; you get no manifold pressure.

Q. You only knew that because you looked at the instrument? A. That is right.

Q. Suppose these instruments were defective? A. If we had five instruments that had simultaneous failure, which would be very improbable.

Q. You looked at five instruments? A. Yes.

Q. And all five showed about 1300 rpm? A. That the engine was inoperative."

In his deposition, Captain Claude testified as follows:

"Q. Was the fuel booster pump put to number four engine? A. It was.

Q. And which member of the crew performed that test? A. The Engineer.

Q. And what occurred after that? A. Number four engine surged.

Q. Now, at what point, with respect to Love Field, and using the diagram, (Plaintiffs' Exhibit 11 on the trial) would you say that number four engine

surged? A. Just after crossing the end of the runway.

* * * * *

Q. Was it at that point you say the number four engine surged? A. Yes.

Mr. Osnato: Can we mark it with an 'F' exactly where the Captain said?

Q. Now, you have put in 'F' alongside the letters 36, which indicates the end, the south end of the runway you were attempting to land on? A. Yes.

Q. Now, you say it was at this point number four engine surged, is that correct? A. Yes.

Q. Will you state the manner in which you determined it surged? A. The aircraft turned to the left, the left wing dropping, and by pressure on the controls.

Q. Now, what controls did you feel the pressure on? A. The right rudder.

Q. The other instrument? A. The aileron.

Q. Which aileron? A. Went into a left bank, why the ailerons are hooked together and you turn the wheel to the right and bring it back up to level, you feel it on both the ailerons and the rudder.

Q. So that it is your testimony that you felt the number four engine surge, after the fuel booster pump was put to the number four engine, by the feel of the controls, is that correct? A. Correct.

* * * * *

Q. In other words, you have marked the letter 'C' with an 'X' mark on the line at the point at which the left wing came up? A. That is correct.

Q. Is it at this point that you ordered power to all three engines or applied power to all three engines? A. It was.

Q. On that, if I understand you correctly, you retarded the power on three and four and you advanced the power on number two, thereby bringing the left wing up? A. Correct.

Q. And that occurred at the point marked letter 'G'? A. Correct.

Q. Now, what was the altitude of the plane at that point, with respect to the field level? A. I would say thirty to forty feet.

Q. Above the field? A. Above the field, yes, sir.

Q. And what was the attitude of the airplane? A. Horizontally level and climbing.

Q. Now, up to what point did the plane continue to climb? A. To a point just after crossing runway number 7.

Q. Now, will you indicate on (Plaintiffs' Exhibit 11), the point you have just described, by letter 'H'? A. Correct.

Q. Now between the points shown 'G' and 'H' you state that the plane was climbing, is that correct? A. Correct.

Q. Now what occurred at the time the plane reached the point marked 'H'? A. At point 'H' she commenced to burble, with an indication of a stall.

Q. Burble? A. Well, buffeting, you could call it.

Q. And what happened? A. Well, that is an indication of a complete stall, and I knew she was gone.

Q. Now, from a point marked 'H' to the point which there is a cross-mark on the line just below the word 'field', on (Plaintiffs' Exhibit 11) could you state what occurred? A. She, the airplane, had stalled then, was settling and going down, and I knew we would never clear that hangar, and I called to the crew that she was gone.

Q. Now, you made reference to a hangar, is there a hangar at the field? A. There is a line of old

wooden hangars across here, I think these represent them. (Indicating.)

Q. Was there a hangar there on the morning of November 29, 1949? A. Yes.

Q. Is that the Dallas Aviation Hangar? A. I think it was, yes.

Q. And was that the hangar—with what did the airplane come in contact for the first time after the stall? A. The left wing tip hit the north end of the hangar and I guess you could call it the northeast corner of the hangar.

Q. And now at the time that the plane was at the position shown by your ink mark 'H', made this morning, can you state what the altitude of the plane was with respect to the hangar?

Mr. Osnato: The altitude with respect to the hangar?

Mr. Laufer: That is right.

A. It was at the time the buffeting occurred, the airplane was above the elevation of the hangar roof, and up to that point I was fully convinced we would clear the hangar and go around okay, and she stalled out and she settled.

Q. Now, at that time, up to that time had you given any order to feather number four prop? A. I had not.

Q. Did anybody inform you that number four prop was feathered, or was to be feathered? A. No.

Q. When for the first time did you learn that number four prop had been feathered? A. The C. A. B. hearing in Dallas, about the 12th or 13th of December."

Flight Engineer Forbes was also unaware that Lewis had feathered the number 4 engine.

In order to find wilful misconduct the jury was required to believe that (i) the competent producing cause of the accident was Lewis' act of feathering the number 4 engine and (ii) Lewis' act was unjustified. Might the jury have so found from the evidence?

Captain Claude stated that in his opinion Lewis' act caused the crash. This presupposes that the number 4 engine was still developing power at the time Lewis feathered it. Captain Claude said that it was, that he could feel it in the controls.

Lewis testified that his act was based upon the instruments which indicated the No. 4 engine was windmilling. As between Claude and Lewis, the jury could have believed Claude that the engine was developing power and not windmilling. Of course, resolving this issue in favor of Claude does not justify a finding of wilful misconduct.

There would be required, in addition, a rejection of Lewis' explanation of his action. But as far as I can gather, there is no evidence, nor did the plaintiffs ever contend, that the instruments upon which Lewis based his actions did not in fact indicate windmilling. To the contrary, plaintiffs attempted to show poor maintenance of the plane as reflected in, among other things, its instruments. At page 12 of plaintiffs' memorandum in opposition to this motion appears the following:

> "It is important to remember that this plane had a very bad maintenance history; that it showed regular trouble with gauges and instruments besides trouble with No. 1 and No. 4 engines which defendant claims was always corrected. Captain Claude testified that No. 4 engine never went out and that when the Flight Engineer called to his attention that 'the fuel pressure on number 4 engine had gone to zero' he ordered the booster pump to that engine and the

engine surged or over-sped. That meant that the engine was working but the gauge was wrong. The record shows that even on this same flight the cowl flap instrument was not accurate, the fuel flow tachometer fluctuated and that the air temperature gauge on No. 4 was inoperative for some time before!"

Therefore, if the jury based its verdict upon Lewis' violation of the Civil Air Regulations in pre-empting the Captain, the evidence was insufficient to find wilful misconduct. It may not be said that Lewis' feathering of the No. 4 engine—a violation though it is—was performed knowing that it would probably result in injury or was performed in such manner as to imply a reckless disregard of its consequences. From the undisputed evidence he used his judgment in an attempt to save the plane and this is not, under the circumstances, wilful misconduct.

Specification (b) is true in part as far as the facts are concerned, and not considering the legal conclusion.

Prior to feathering the No. 4 engine Lewis retracted the landing gear but did not raise the flaps. Captain Claude said that he ordered the gear and flaps up—an order heard by the Flight Engineer—but Lewis said he did not hear it.

His testimony, again:

"Q. When you got to that point what did you see, what did you observe and what happened after that? A. Applied full power and I retracted the gear.

Q. Did the captain give an order to retract the gear? A. I didn't hear him give it, but it has been testified—

Q. I just want to know whether he gave it—

Mr. Laufer: Let him finish.

The Witness: I didn't hear him actually give the command to retract the gear.

Mr. Laufer: If your Honor please, he was saying something else when Mr. Junkerman interrupted him.

Q. Please say whatever you were saying when Mr. Laufer says I interrupted? A. I was going to say that it has been testified by both Mr. Forbes and Captain Claude that the order was given. I say I didn't hear it.

Q. Then why did you retract the gear? A. It was normal procedure in an emergency, a go-around.

Q. Did you think the captain was following emergency procedure for another go-around? A. Yes.

Q. Is that the reason you pulled up the gear? A. Yes, it was.

Q. You pulled up the gear. Did you make any attempt to pull up the flaps? A. No, sir.

Q. Why not? A. The air speed of the airplane was too low to retract.

Q. If you had retracted the flaps at that time what would have happened? A. The airplane would have immediately stalled where it was.

Q. How high were you above the level of the ground at that time? A. Approximately 20 feet.

Q. So the application or retracting the flaps would have a tendency to immediately settle the plane, would it not? A. Yes, at that speed."

It may be said of Lewis in this instance that he was inattentive, hard of hearing or substituting his judgment for the Captain's. The jury could have thought the latter. But if it did, what evidence is there aside from the crash that his judgment was poor? There is none. As indicated heretofore, the Captain attributed the crash to the feathering and no one on plaintiffs' side detracted in the slightest from Lewis' opinion that raising the flaps under the circumstances would have caused an immediate settling of the

plane. The jury may have chosen to disregard Lewis' opinion but if it did there was no evidence upon which to base a contrary judgment.

Therefore, to the extent that the expression "with full knowledge of the probable consequences of such act" in specification (b) implies a crash, there was no proof to sustain it.

The remaining specifications are more or less unwarranted conclusions of counsel or are general statements, some of which were not proven. There is no basis upon which the jury might find wilful misconduct from any one or combination of these specifications. On the contrary, the evidence adduced was consistent only with airworthiness of the plane at the time it departed on its ill-fated flight.

Assuming that the plane crash was caused by the act of co-Pilot Lewis in cutting out the No. 4 engine by feathering and by a failure to retract the flaps as directed by Captain Claude, I am convinced that plaintiffs have not made out a case on the theory that the accident was caused by the wilful misconduct of defendant and its employees. In coming to this conclusion I am not passing on any disputed version of any of the witnesses; I am not passing on the credibility of the story told by one witness as against that told by another. I am viewing the evidence with all inferences favorable to plaintiffs and considering all the evidence most favorable to plaintiffs' theory and claim in this respect. In so doing, I am strongly convinced that from all such evidence the jury was not justified in bringing in a verdict which by its very terms was a finding that this accident, which resulted in the death of Mr. and Mrs. Grey, was caused and brought about by the wilful misconduct of defendant, its agents and servants, as defined by me in my charge to the jury, to which no exception was taken.

The motion to set aside the verdict of the jury is granted and the plaintiffs shall have judgment for $8,300 for the death of Harry M. Goldberg and $8,300 for the death of Sophie Goldberg.

I will now take up defendant's motion for a new trial on the grounds that the verdicts are contrary to the evidence and the law and are excessive.

While this motion is made in the alternative, I believe I have to pass on it, notwithstanding that I have decided the first motion in favor of defendants. *Montgomery Ward and Co.* v. *Duncan*, 311 U. S. 243.

In passing on the second part of the motion I am only concerned with the amount of the verdicts. As I stated before, the verdicts were as follows:

For the death of Harry M. Goldberg:

Howard M. Grey	$50,000.
Doris S. Grey	$30,000.

For the death of Sophie Goldberg:

Howard M. Grey	$ 5,000.
Doris S. Grey	$ 5,000.

I charged the jury that in awarding damages they should take into consideration the following:

1. Pecuniary loss of contributions of each parent for support, education and so forth during minority.

2. The value of the services which each parent might and would have rendered in training and educating the children during minority.

3. The loss of reasonable contributions each child might receive after majority from the parent.

4. The loss of prospective accumulations of the parent during his or her lifetime.

At the time of his death Harry M. Goldberg was 47 years of age and had a life expectancy of about 23 years. His wife Sophie was 42 years of age and had a life expectancy of about 26 years. At the time of the deaths of their father and mother, Howard Grey was 17 years and 3 months of age and his sister was 20 years and 3 months of age.

At the time of his death Harry M. Goldberg was earning $12,500 a year, with good prospects for increments. He had assets consisting of a home for which no value was given and participation in a profit-sharing plan which had accumulated $5,800 in about 5 years.

Sophie Goldberg had no income and no assets.

I think it will be helpful to take up the various items of damage to which each child was entitled:

1. Pecuniary loss during minority. Here we start with the yearly salary of the father ($12,500). There was no proof as to taxes or other obligations. There is little to base any finding as to how much was expended for each child, but we do know this: that Howard had about 3 years and 9 months, or approximately 45 months, left of his minority, while Doris had 9 months left.

Assuming, *arguendo,* that the father netted $12,500 a year, we may further assume that one-fourth of this amount might be allocated to a child. Following these assumptions, the calculation shows that Howard's pecuniary loss would be about $11,700; for Doris it would be about $2,350.

These assumptions are quite liberal, as I see it. They do not take into account any deduction for income taxes and they do contemplate the expenditure of one-half the income for the children's support, etc.

It should be noted, too, that at the time of the death of her father Doris was earning $40 per week and contemplat-

ing marriage, and did marry two months later. It is apparent that her pecuniary loss was, if any, very little.

The children had no pecuniary loss as the result of their mother's death since there was no proof that the mother had any income or property.

2. Value of services for training, education, etc.

Of course, this is an intangible item and may not be measured by any exact pecuniary standard. One should bear in mind, however, the rather short time the children, under the law, might be compensated for their loss of service. However, in arriving at a monetary figure for the loss of the father, one may consider the jury's verdict in assessing damages for the loss of the mother.

Since there was no proof of any income or property for the mother, the verdict of the jury awarding $5,000 to each of the children can represent only the value of loss of service for care, maintenance, etc. If Howard's loss was $5,000, Doris' had to be appreciably less in view of her marriage before reaching 21 years and her shorter period of minority remaining.

It seems to me that this value might very well be assigned for the father's loss.

3. Loss of contributions after maturity.

There is definite authority in the Texas cases for this item of damage. See *Lancaster* v. *Magrill*, 244 S. W. 1078 (1922); *International Great Northern R. Co.* v. *Acker*, 128 S. W. 2d 506 (1939). In *Hughes Production Co.* v. *Hagan*, 114 S. W. 2d 326 (1938), the court agreed that the trial judge was in error in permitting the jury to find on this item where there was no proof that the minor would have received contributions after reaching majority. *International Great Northern R. Co., supra*, supports the *Hughes* holding.

As far as I can ascertain, the only proof in this respect is that the father intended Howard to have a good education and, impliedly, would have contributed to this after the majority of the son.

4. Loss of prospective accumulations.

International Great Northern R. Co. v. *Acker, supra,* supports this item.

The only value of the father's estate or what it might be is the accumulation of $5,800 in the profit sharing plan of his employer. There was no proof as to the value of any other property he might have possessed. At the present rate of accumulation, it might be said that this fund would very well not exceed $32,480 in 23 years. Assuming that the children equally shared that amount in 23 years, it would amount to $16,240 each. At 2% interest the present value of an insurance policy of $32,480 payable at the father's death would be $20,380, for example, or $10,190 each.*

Since no proof of the mother's property was presented, the children could not anticipate accumulations from her.

I have gone into the question of damages at some length, because I realize that ordinarily a jury's verdict on the amount of damage in a case of this kind should stand, even though I might disagree as to the amount. Here there is more than that. I am not setting my judgment against that of the jury. The figures I have set forth above indicate to me clearly that the jury without doubt were influenced by sympathy for this young man and woman, who

---

*Based on United States Life and Actuarial Tables, 1939-1941, Table 20, page 64. This sum is conditioned upon the slightly higher life expectancy reflected in these Tables than the 23.08 given to the jury. However, the Tables are sufficiently close (23.97) for demonstration purposes.

$32,480 discounted at 2% would be $20,597.30.

lost their father and mother in one catastrophe. That is the only way I can account for these verdicts, which can be demonstrated, and I think have been, to be excessive. I see no other recourse except to set aside these verdicts as excessive and to grant a new trial.

So Ordered.

Settle order on notice.

February 21, 1955.

EDWARD A. CONGER,
United States District Judge.

SUPREME COURT, U.S.
FILED
FEB 25 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 655

DORIS SYLVIA GREY, infant, and HOWARD MARTIN GREY, infant, children of Harry M. Goldberg, deceased, and Sophie Goldberg, deceased, by ESTHER WEINER, their guardian *ad litem*,

Petitioners,

—against—

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. JUNKERMAN,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

INDEX

PAGE

Statement 1

Argument:

I. This Court has heretofore declined to review similar final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention 5

II. No conflict of decisions and no important question of federal law is involved 10

III. In any event the decisions of the District Court and the Court of Appeals were clearly correct 13

Conclusion 18

CITATIONS

Cases:

Garcia v. *Pan American Airways, Inc.*, 183 Misc. 258, 269 App. Div. 287, 295 N. Y. 852, cert. den. 329 U. S. 741; 274 App. Div. 996, cert. den. 338 U. S. 824 ..... 5, 7

Goepp v. *American Overseas Airlines, Inc.*, 281 App. Div. 105, 305 N. Y. 830, cert. den. 346 U. S. 474 ..... 5, 8, 9, 10, 16

Lavender v. *Kurn*, 327 U. S. 645 10

Lee v. *Pan American World Airways, Inc.*, 275 App. Div. 855, leave to appeal den. 275 App. Div. 962 and 300 N. Y. 761, cert. den. 339 U. S. 920 ..... 5, 7, 8

PAGE

Moore v. *Chesapeake & O. R. Co.*, 340 U. S. 573.. 17

Ross v. *Pan American Airways, Inc.*, 299 N. Y. 88, cert. den. sub nom. *Froman* v. *Pan American Airways, Inc.*, 349 U. S. 947 5

Tennant v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29 10

Wyman v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 334 U. S. 882 .....5, 6, 7

Statutes and Rules:

Federal Rules of Civil Procedure, Rule 50(b) 2

Rules of the Supreme Court of the United States, Rule 19(b) 13

Warsaw Convention (49 Stat. 3000, *et seq.*), 2, 3, 4, 5, 7, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 655

DORIS SYLVIA GREY, infant, and HOWARD MARTIN GREY, infant, children of Harry M. Goldberg, deceased, and Sophie Goldberg, deceased, by ESTHER WEINER, their guardian *ad litem*,

Petitioners,

—against—

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioners, plaintiffs below,* seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, affirming a judgment of the Unitel States District Court for the Southern District of New York entered upon the District Court's order, dated March 3rd, 1955, setting

* The plaintiffs, Howard Martin Grey and Doris Sylvia Grey, children of the said Harry M Goldberg and Sophie Goldberg, were 22 and 25 years of age, respectively, at the time of the trial but were infants of 17 years and 3 months, and 20 years and 3 months, respectively, at the tine of their parents' deaths.

aside verdicts in favor of plaintiffs and directing judgment in favor of plaintiffs in the amount of $16,600 only. The action resulted from the deaths of petitioners' parents, who were passengers on an international flight on one of respondent's DC-6 airplanes which crashed at Love Field, Dallas, Texas, on November 29, 1949.

The opinion of the District Court, dated December 21, 1950, which denied petitioners' motion for summary judgment directed to the sufficiency of respondent's affirmative defenses based upon the Warsaw Convention, is reported in 95 F. Supp. 756. However, neither that opinion nor the papers, affidavits and exhibits upon which it is based, are printed in the record or in petitioners' appendix to their petition. The opinion of the District Court granting respondent's motion for judgment notwithstanding the verdict, and in the alternative for a new trial, is not officially reported but is printed both in the record (R. 6a-33a) and in the appendix to the petition (Pet. 32-57).* The unanimous opinion of the Court of Appeals, affirming the judgment and order of the District Court is reported in 227 F. 2d 282, and is also printed in the appendix to the petition (Pet. 25-31).

Upon the trial of the action, the jury returned a verdict in favor of petitioners in the amount of $80,000 for the death of their father and $10,000 for the death of their mother. Respondent immediately moved, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, to set aside the verdict and for a direction dismissing the complaint for all amounts in

* In this brief, references including the prefix "R" apply to pages in the printed appendix record filed by petitioners; references including the prefix "Pet." apply to pages in the appendix to the petition.

excess of $8300 for the death of each decedent and, in the alternative, for a new trial upon the ground that the verdict was contrary to the evidence and contrary to the law, and upon the further ground that the verdict was excessive insofar as it exceeded the sum of $8300 for the death of each decedent. This motion was based upon the fact that the transportation on which decedents lost their lives was international transportation by air as defined by the Warsaw Convention and that in the absence of proof of wilful misconduct under Article 25 thereof, recovery was limited by the provisons of Article 22 of said Convention.*

The Trial Court granted respondent's motion, set aside the verdict and directed judgment for petitioners in the limited amounts provided under the terms of the Warsaw Convention, stating (Pet. 52):

> "* * *, I am convinced that plaintiffs have not made out a case on the theory that the accident was caused by the wilful misconduct of defendant and its employees. In coming to this conclusion I am not passing on any disputed version of any of the witnesses; I am not passing on the credibility of the story told by one witness as against that told by another. I am viewing the evidence with all inferences favorable to plaintiffs and considering all the evidence most favorable to plaintiffs' theory and claim in this respect. In so doing, I am strongly convinced that from all such evidence the jury was not justified in bringing in a verdict which by its very terms was a finding that this accident, which resulted in the death of Mr. and Mrs. Grey, was caused and brought about by the

* 49 Stat. Pt. 2, p. 3000 *et seq.*

wilful misconduct of defendant, its agents and servants, as defined by me in my charge to the jury, to which no exception was taken" (R. 28a; Pet. 52).

In unanimously affirming the action of the District Court, the Court of Appeals per Medina, *J.* stated, *inter alia,* that "we cannot discover anything in the case to warrant a finding of wilful misconduct", and further that "the record is still devoid of any evidence of wilful misconduct" (Pet. 31).

ARGUMENT

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. This Court has heretofore declined to review similar final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention.

2. No conflict of decisions and no important question of federal law is involved.

3. In any event the decisions of the District Court and the Court of Appeals were clearly correct.

POINT I

This Court has heretofore declined to review similar final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention.

In prior wrongful death cases involving the Warsaw Convention, this Court has declined to review final judgments limiting recoveries thereunder in the absence of pleading or proof of wilful misconduct.

> *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882;
>
> *Garcia* v. *Pan American Airways, Inc.*, 183 Misc. 258, 269 App. Div. 287, 295 N. Y. 852, cert. den. 329 U. S. 741; 274 App. Div. 996, cert. den. 338 U. S. 824;
>
> *Lee* v. *Pan American Airways, Inc.*, 275 App. Div. 855, leave to appeal den. 275 App. Div. 962 and 300 N. Y. 761, cert. den. 339 U. S. 920;
>
> *Goepp* v. *American Overseas Airlines, Inc.*, 281 App. Div. 105, 305 N. Y. 830, cert. den. 346 U. S. 474.

The same has been true with respect to judgments limiting recoveries in personal injury cases.

> *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 38, cert. den. sub nom. *Froman* v. *Pan American Airways, Inc.*, 349 U. S. 947.

In the *Wyman* case, petitioners were the executors of a passenger who lost his life when the airplane on

which he was traveling disappeared between Guam and Manila. At the close of the plaintiffs' case defendant rested without introducing any proof and then moved for a directed verdict in plaintiffs' favor in the sum of $8300. The Court granted defendant's motion and directed the jury to bring in a verdict for plaintiffs in the sum of $8300. Later the Court denied plaintiffs' motion to set aside the verdict as inadequate, stating (181 Misc., at p. 965):

> "The Warsaw Convention rules are applicable only to international flights (art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (art. 22) except where the carrier is guilty of 'wilful misconduct' (art. 25).
>
> There was no proof in this case of 'wilful misconduct' on the part of defendants (*Wass* v. *Stephens,* 128 N. Y. 123; *Brown* v. *Garey,* 267 N. Y. 167), and, indeed, no proof of any negligence connected with, or as a proximate cause of, the accident. (*Kilinowski* v. *Ryerson & Son, Inc.,* 242 App. Div. 43, affd. 270 N. Y. 532.) Nor, in view of the circumstances, were defendants able to offer any proof in rebuttal of the presumption of liability (art. 20).
>
> The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof. On these considerations, at the conclusion of the trial, a verdict was directed for plaintiffs in the sum of $8,300, in accordance with the rules stated."

The judgment entered in the foregoing case was unanimously affirmed without opinion by both the Appellate Division, 267 App. Div. 947, and the Court of Appeals, 293 N. Y. 878, and this Court denied certiorari, 324 U. S. 882.

In both the *Garcia* and *Lee* cases, *supra,* petitioners' decedents had been international passengers who lost their lives in the crash of an airplane near Lisbon, Portugal. Similar to the present action, neither complaint alleged that the accident was caused by wilful misconduct on the part of defendant or facts amounting thereto, and defendant's defenses, pleading the Warsaw Convention, were substantially similar to the defenses pleaded in the case at bar. In both cases, plaintiffs moved to dismiss these defenses on the ground that they were insufficient in law. In the *Garcia* case, the motion was denied and the constitutionality of the Convention was expressly upheld, 183 Misc. 258, affirmed 269 App. Div. 287, affirmed (no opinion) 295 N. Y. 852, certiorari denied, 329 U. S. 741. Subsequently, defendant moved for summary judgment in favor of plaintiffs for the limited sum of $8300. This motion was granted and the judgment entered thereon was affirmed by the Appellate Division, 274 App. Div. 996. The Court of Appeals denied leave to appeal from the final judgment (not reported) and this Court again denied certiorari, 338 U. S. 824. In the *Lee* case, the motion to strike the defenses of the Warsaw Convention was denied, and defendant's subsequent motion for judgment on the pleadings in favor of plaintiffs in the sum of $8300 was granted. Both of these orders and the judgment were unanimously affirmed by the Appellate Division, 275 App. Div. 855. Plaintiff's motions for leave

to appeal were denied by both the Appellate Division, 275 App. Div. 962, and the Court of Appeals, 300 N. Y. 761, and this Court denied certiorari, 339 U. S. 920.

Goepp v. *American Overseas Airlines, Inc., supra,* is in many respects remarkably similar to the case at bar. In that case, a New York Supreme Court jury returned a verdict in excess of defendant's limited liability and defendant immediately moved to set aside the verdict and for a direction dismissing the complaint for all amounts in excess of $8300, and in the alternative for a new trial. The Trial Court, although expressing grave doubts as to the sufficiency of the evidence to take the case to the jury, refused to disturb the jury's verdict and defendant appealed. In reducing the verdict from $65,000 to $8300, the Appellate Division, First Department stated (281 App. Div. 105, 107):

> "Plaintiff charged that the defendant had violated certain safety regulations of the United States Civil Aeronautics Board. A jury to whom the case was submitted found the defendant carrier guilty of wilful misconduct in that it had violated the regulations as claimed by plaintiff. Damages were awarded to plaintiff in the amount of $65,000, as a corollary to a finding of violation of the regulations constituting wilful misconduct.
>
> Defendant upon this appeal does not question plaintiff's right to recover $8,300 under the Warsaw Convention. It does contest the judgment and verdict insofar as a sum in excess of $8,300 is awarded. * * *

* * * *

* * * Wilful misconduct, as the trial court correctly charged, depends upon the facts of a particular case, but in order that an act may be characterized as wilful there must be on the part of the person or persons sought to be charged, a conscious intent to do or to omit doing the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. The burden of establishing wilful misconduct rests upon plaintiff. (*Ulen* v. *American Air Lines,* [1948] U. S. Av. Rep. 161, affd. *sub nom. American Airlines* v. *Ulen,* 186 F. 2d 529, 533; *Ritts* v. *American Overseas Airlines,* [1949] U. S. Av. Rep. 65; *Pekelis* v. *Transcontinental & Western Air,* [1950] U. S. Av. Rep. 296, revd. on other grounds 187 F. 2d 122, certiorari denied 341 U. S. 951; 65 C. J. S., Negligence, § 9.)

* * * *

Upon the record in this case, there was no evidence submitted to show that asserted violations of air safety regulations were the proximate cause of the accident, or that defendant was guilty of any wilful misconduct within the purview of the provisions of the Warsaw Convention. The trial court should have granted defendant's motion to dismiss plaintiff's complaint insofar as there was any claim of liability in excess of $8,300."

On appeal to the Court of Appeals, the judgment entered upon the Appellate Division's order reducing the aforesaid verdict was unanimously affirmed, 305 N. Y.

830, and this Court denied certiorari, 346 U. S. 474. In the *Goepp* case, the petitioner argued unsuccessfully that a submissible case for the jury on the issue of wilful misconduct had been presented and that the Appellate Court had substituted its findings, deductions and conclusions from the evidence on the issue of wilful misconduct for the verdict reached by the jury and had thus deprived petitioner of a jury trial by directing a contrary verdict. It will be noted that in the case at bar, petitioners' principal argument under the headings of "Questions Presented" and "Reasons For Granting Writ" are strikingly similar to the argument which failed to move this Court to exercise its certiorari jurisdiction in the *Goepp* case.

POINT II

No conflict of decisions and no important question of federal law is involved.

No novel or important question of general application is involved in this case. Substantially all that is involved is whether, on the record in this case, petitioners presented a submissible case for the jury on the issue of wilful misconduct. The District Court and the Court of Appeals, applying well-established rules of law, held that they did not. None of the cases cited by petitioners is in conflict with the decisions and judgment in the case at bar. Certainly the language quoted from *Tennant* v. *Peoria & Pekin Union R. Co.,* 321 U. S. 29, at pages 8 and 9 of the petition, and the language from *Lavender* v. *Kurn,* 327 U. S. 645, quoted at pages 9 and 10 of the peti-

tion, is not in conflict with the Court of Appeals statement in the present case (Pet. 29):

> "Moreover, as this is a jury case, plaintiffs are entitled to have the evidence viewed in the light most favorable to plaintiffs. All questions of credibility were for the jury. It was within their province to pick and choose, to accept a part or the whole of the testimony of any particular witness, and to reject the rest. Where conflicting inferences were rationally admissible, it was a function of the jury to take those which they considered most consistent with the general pattern of the proofs. And this congeries is summed up in the general verdicts. The trial judge had a right to reject the finding of wilful misconduct only if, on no possible view of the evidence, could reasonable men reach that conclusion. *Binder* v. *Commercial Travelers,* 165 F. 2d 896 (2 Cir. 1948); 3 Moore, Federal Practice § 50.01 (1938)."

The above statement clearly refutes the rash and false argument at pages 16 and 17 of the petition that "The Courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness." That the Court of Appeals decision in the case at bar is perfectly consistent with the cases cited by petitioners is further emphasized by the following statement in its decision (Pet. 31):

> "True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record

is still devoid of any evidence of wilful misconduct."

In petitioners' "Point III" they infer that the Convention is not applicable because the passenger tickets did not set forth the agreed stopping places. They fail to advise this Court that their motion in the District Court raising this issue was denied by District Judge Noonan on December 21, 1950, in a scholarly opinion reported in 95 F. Supp. 756, wherein he considered and rejected the arguments raised by petitioners with respect to this point. They not only have failed to print Judge Noonan's opinion in the record in this case but also they have failed to print or refer to the affidavits and exhibits upon which Judge Noonan based his decision in part, at least. Petitioners cite no authority whatsoever for their wholly untenable argument that the respondent's failure to list the "agreed stopping places" on the tickets issued and delivered to their decedents deprived respondent of the limitation of liability provisions of the Warsaw Convention. It is respectfully submitted that Judge Medina amply disposed of petitioners' oblique reference to this point in the Court below when he said (Pet. 26):

> "While plaintiffs contended that the Warsaw Convention was not applicable, because the passenger tickets issued to decedents did not make reference to the intermediate 'agreed stopping places' of Washington, D. C., and Dallas, Texas, motions to strike the usual Warsaw Convention limitation of liability defenses, based upon this technical and wholly unsubstantial alleged omission, were denied before trial by Judge Noonan.

> We agree with Judge Noonan's reasoning and see no occasion to elaborate upon his carefully prepared opinion. *Grey* v. *American Airlines,* 95 F. Supp. 756 (S. D. N. Y. 1950)."

Point IV under the alleged "Reasons For Granting Writ" is so palpably insufficient in both law and fact as not to require extended comment. Suffice it to say that the amount of the verdict, while of concern and importance to the immediate parties hereto, can hardly be deemed a matter falling within the scope of Rule 19(b) of this Court's rules.

In addition to the fact that the awards were properly limited to $8300 for the death of each of plaintiffs' decedents in the absence of proof of wilful misconduct, Judge Conger correctly ruled on the alternative branch of defendant's motion to set aside the jury's verdicts in that part of his opinion which is printed at pages 53 to 57 of the petition. Petitioners advance no logical answer to Judge Conger's analysis of why these verdicts were excessive.

POINT III

In any event the decisions of the District Court and the Court of Appeals were clearly correct.

The lack of any evidence of wilful misconduct on the part of respondent or its employees is readily demonstrated upon examination of the record. The evidence established, and it was undisputed, that petitioners' decedents were passengers on a DC-6 airplane, owned, operated, maintained and controlled by respondent; that the airplane, operating as Flight 157, crashed at Love Field, Dallas, Texas, on the morning of November 29, 1949, and that petitioners' decedents lost their lives in the crash. It was also undisputed that the flight crew, captain, first officer and engineer, had checked the airplane log book and performed all of their various pre-departure duties at La Guardia Field prior to taking off on the evening of November 28, 1949. The take-off, climb and flight from La Guardia to Washington were described by all three crew members as routine, as were the take-off, climb and flight out of Washington. All three crew members testified that the airplane was airworthy on both of these take-offs. Prior to reaching Nashville, Tennessee, the aircraft passed through a storm or frontal condition, concerning which the crew had been briefed prior to departure and shortly before reaching Nashville the flight broke out into the clear.

In the vicinity of Nashville, the number 1 engine backfired, and although remedial measures were attempted to correct this condition, the back-firing persisted and the propeller of that engine was therefore

feathered approximately twenty-five miles west of Nashville. The flight continued on to Dallas on three engines with no appreciable loss in airspeed and carrying just a slight amount of rudder trim to compensate for the feathered engine. In the vicinity of Altheimer, Arkansas, the flight contacted the company radio station at Forth Worth and suggested a change of equipment upon arrival at Dallas so that the passengers who were going on to Mexico City would not be delayed while the number 1 engine was being checked by ground maintenance. In the vicinity of Garland, Texas, approximately fifteen miles northeast of Dallas, the pre-landing check list was accomplished, and at that time the flght engineer noticed that the number 4 main fuel tank, which was feeding the number 4 engine, contained approximately 500 pounds of fuel, or more than enough to reach Dallas and land.

As the flight neared Love Field, Dallas, the wing flaps were partially extended and a right turn was made to aline the plane for a landing on runway 36, the north-south runway. Both the captain and the first officer testified that the right turn was too wide and that upon completion of the turn the airplane was to the left of and not lined up with the runway. According to the captain, he corrected his position, following which the landing gear was lowered and full flaps were extended. According to the first officer, the captain attempted to correct his position, but the airplane drifted further to the left, and during this time the gear was lowered and full flaps were extended.

The plane continued on to the airport, and at some point, either while crossing the road near the airport boundary, as stated by the captain, or approximately

a half mile back, as stated by the first officer, the flight engineer noticed that the fuel flow on the number 4 engine had dropped to zero and called out that that engine was cutting out. The captain ordered the booster pump applied, and the engineer complied with this order by turning on the number 4 booster pump. According to the testimony of the captain, the number 4 engine surged back in, the left wing went down and the airplane yawed or turned to the left. He stated that he got the left wing up, applied full power on engines 2, 3 and 4, called for the landing gear and flaps to be retracted and attempted to climb out for a new landing approach, when the airplane stalled and hit a hangar on the west side of the airport.

The first officer testified that he did not hear any order to raise the gear and the flaps, but knew from the actions of the captain that the latter was attempting to pull up and go around. He raised the landing gear, but because of the low altitude and slow airspeed he did not retract the flaps, fearing that if he did so at that time it would cause the airplane to stall and settle immediately. At the same time he noted from five different instruments on his instrument panel that the number 4 engine was not developing power, but was windmilling. This would cause increased drag on the airplane. He therefore feathered the number 4 engine's propeller to reduce the drag and enable the plane to climb out, if possible. He did not advise the captain that he was feathering because there was insufficient time. He thought that the captain had seen him push the feathering button. After feathering the number 4 engine, the first officer attempted to tell the control tower at the airport

that the engine had been feathered and that they were losing the airplane. The impact of the plane hitting the hangar cut off this transmission.

This then was the evidence on the issue of liability. It was petitioners' burden to prove that the deaths of their decedents were caused by an intentional act performed with the realization of the probability of injury from the conduct and a disregard of the probable consequences of such conduct (*Goepp* v. *American Overseas Airlines, supra,* and cases cited therein). Viewing the evidence and all admissible inferences therefrom in the light most favorable to petitioners, as both the District Court (Pet. 52) and the Court of Appeals (Pet. 29) scrupulously did, the record is barren of sufficient evidence to constitute a submissible case for the jury on the issue of wilful misconduct.*

Petitioners' main argument proceeds on the false premise that rejection of the first officer's explanation of his actions or disbelief of his testimony furnishes a basis for a finding of wilful misconduct on his part. However, as this Court has pointed out in *Moore* v. *Chesapeake & O. R. Co.,* 340 U. S. 573, 576, disbelief of the first officer's testimony would not supply a want of proof. Both the District Court and the Court of Appeals, whose duty it was to scrutinize the record to determine if a submissible case had been made out,

* Throughout their petition, petitioners make some fantastic claims of what they "proved at the trial". They reach the height of absurd inaccuracy and disregard of the record in their list of twelve enumerated items on pages 14 and 15 of their petition. This list consists of fanciful and partisan contentions.
The captain did not testify at the trial as erroneously stated at page 3 of the petition. His deposition, taken by plaintiffs long after his employment by defendant had terminated, was read in part into the record during the trial.

recognized and met the fallacy in petitioners' argument. Thus, the District Court stated (Pet. 52):

> "The jury may have chosen to disregard [First Officer] Lewis' opinion but if it did there was no evidence upon which to base a contrary judgment."

and the Court of Appeals, in affirming unanimously, stated (Pet. 31):

> "True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record is still devoid of any evidence of wilful misconduct."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. JUNKERMAN,
Counsel for Respondent.

JAMES B. MCQUILLAN,
Of Counsel.